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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

**No. 71-646**

SYSTEM COUNCIL T-4, COMPRISED OF LOCAL UNIONS 134, 165, 315, 336 AND 399 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## REPLY BRIEF OF PETITIONER.

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The Solicitor General and the Intervenor in the Court below, filed their briefs in opposition to the Petition for Writ of Certiorari and raised a question of jurisdiction. It is argued that the Petition was filed two days beyond the time limit and, therefore, the Court is without jurisdiction to entertain the Petition. As authority the Intervenor cited two cases: *Pittsburgh Towing Co.* v. *Mississippi Valley Co.*, 385 U. S. 32 and *Levine* v. *United States*, 380 U. S. 915, 967; and the Government cited three cases: *Teague* v. *Regional Commissioner of Customs, Region II*, 394 U. S. 977; *Scofield* v. *National Labor Relations Board*, 394 U. S. 423, 427; *Williams* v. *United States*, 400 U. S. 909.[1]

1. The citations of *Williams* and the *Levine* cases will not be discussed directly because these are memorandums of the court which contain no express comment on the question. However, it is interesting to speculate whether the issuance of the memorandum denying Certiorari is itself an exercise of the Court's jurisdiction.

There have been many instances in cases before this Court where the question of the Court's jurisdiction to entertain a Petition for Writ of Certiorari has been raised. Both the Court's own rules and Title 28 of the United States Code have been involved in these decisions. While the Government cites the *Teague* case, supra, as its authority, the only discussion of this question appears in the dissent by Justice Black. It is clear that any contention that this Court lacks jurisdiction because of a few days delay in filing, is without merit for the reasons enunciated by Justice Black in that case as follows:

> "The statute governing the time for seeking certiorari in a civil case, 28 U. S. C. § 2101(c), provides that a petition for review of any judgment or decree 'shall be taken or applied for within ninety days after the entry of such judgment or decree.' It is suggested by the Solicitor General, on behalf of respondents here, that this statute is 'jurisdictional,' and that we must follow it. I agree, of course, that we should follow the statute. But we must first determine what the statute means. Commentators and this Court alike have often said that the statute is 'jurisdictional,' and no doubt this statement is true in certain senses of that term. But the statement certainly is not true if it is intended to suggest that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. Under no known principle of statutory construction can such an interpretation of § 2101(c) be supported. Nor have I been able to find any case interpreting the statute in this way. Although many cases repeat the 'jurisdictional' formula, none of them that I have found involved situations where the delay was wholly caused by circumstances entirely beyond the petitioner's control. In fact, many of the early cases interpreting Rev. Stat. §§ 997, 1008, the predecessors of § 2101(c), made clear that this Court had power to waive the time

requirement of these provisions under appropriate circumstances. In recent years this Court has on occasion granted certiorari and decided on the merits civil cases that had been filed after the 90-day period, without making any mention of the time question. See, *e. g., Ray v. Pierson,* 386 U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (No. 94, October Term, 1966).

In addition, we have squarely adopted this approach in interpreting several related statutes. The provision governing direct appeals to this Court from a district court, now § 2101(a), provides that '[t]he record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.' The Court held, under circumstances much less compelling than those present here, that this provision did not eliminate our power to hear appeals docketed after the 60-day period, noting that '[i]t would not expedite determination of constitutional questions to dismiss appeals because errors in practice.' United Public Workers of America v. Mitchell, 330 U. S. 75, 86, 67 S. Ct. 556, 91 L. Ed. 754 (1947). The cases deciding the timeliness of an appeal to the court of appeals have reached the same result under statutes that were even more clearly phrased in mandatory terms, and did not explicitly include even an indirect reference to a judicial rule-making power on the subject. E.g., Georgia Hardwood Lumber Co. v. Compania, 323 U. S. 334, 65 S. Ct. 293, 89 L. Ed. 280 (1945); R. F. C. v. Prudence Securities Advisory Group, 311 U. S. 579, 61 S. Ct. 331, 85 L. Ed. 364 (1941)." *Teague* v. *Regional Commissioner of Customs, Region II,* 394 U. S. 977, 981.

The citation of *Scofield* v. *NLRB,* 394 U. S. 423, 427 is not valid precedent because in that decision the Court entertained the petition and noted that in labor cases confusion may arise as to the exact date when the calculation of the ninety day time period should begin. The Court then concluded that the matter of the mathematical

computation is not one that should be strictly construed. Nowhere in that case, particularly at page 427 is there any statement of the conclusion that the Court lacks jurisdiction because of the provisions of 28 U. S. C. 2101.

The decision in *Pittsburgh Towing* holds that a failure to comply with Rule 13(1) of the Rules of the Court, in docketing an appeal, is the basis for exercising the Court's discretion in dismissing the appeal. However, the Court has subsequently held that this decision stands for the proposition that the time requirements of Rule 13(1) are not jurisdictional in nature. *Johnson* v. *Florida,* 391 U. S. 596, 88 S. Ct. 1713. Therefore, this citation for the contention that the Court lacks jurisdiction is not accurate because, under Rule 13 the Court may exercise its discretion in entertaining or refusing to entertain a petition. However, if Rule 22 is considered, as apparently was intended by the Intervenor's reference to 28 U. S. C. 2101(c), then other factors must be considered.

Rule 22, Subsection 3 provides that a petition for writ shall be filed in time prescribed by law. The nature of the NLRB proceedings and particularly the statutory provisions enacted by Congress to review the Court decision must necessarily be considered. In 29 U. S. C. 160(e) and (f) review is provided for from NLRB decisions either by the Board itself for an enforcement under (e) or by a party injured by the decision under (f). Subsection (f) provides that review shall be within the time limits prescribed by 28 U. S. C. 2112.

In 28 U. S. C. 2112 the authority is specifically given to the various courts of appeal to determine the time within which a request for review of the NLRB decision may be made. Thus it is clear that Congress in the matter of the appeal process in labor relation cases has provided for less than a definite time period for the appellate review. Of even greater significance is the nature of the rights arising under the National Labor Relations Act.

Petitioner submits that the nature of the cases arising under that statute have been viewed as different in nature than most other types of cases reviewed by the Court because not only private, but public rights are adjudicated. *U. A. W.* v. *Scofield* and *U. A. W.* v. *Fafnir*, 86 S. Ct. 373, 382 U. S. 205.

Finally there is a serious question as to when there exists a final order of the Board from which Subsections (e) and (f) review may be had. Should the party adversely affected by the order decline to voluntarily comply with that order, the Board under the Statute must proceed to Court for enforcement of that order and/or a contempt citation, if there is an existing order from a Court of Appeals.

Thus it is possible under the statute for the question of final judgment and, therefore, the time for review by this Court, to arise at a later time based upon an appeal from a contempt citation by the Court of Appeals. The petitioner submits that this Court has clearly held in other decisions that in order to avoid circuity and delay, it is more appropriate for the Court to review a decision on its merits than to wait for a subsequent petition which may be more within the mathematical calculation set out in the statute. *Heflin* v. *U. S.*, 358 U. S. 415 and *Taglianetti* v. *U. S.*, 394 U. S. 316. Certainly, the petitioner wishes to avoid any contempt citation to allow appellate review on the merits of the original Board order. Therefore, petitioner urges the Court to review the case on its merits at this time.

It is submitted that the petitioner in particular and the employees in general should not be denied the review because of a two-day error in calculation by the counsel for the petitioner. The reasons for the Court granting review under these circumstances is eloquently stated by Justice Black in the *Pittsburgh Towing Co.* v. *Mississippi Valley Co., supra.*

"Due to a misunderstanding among appellant's lawyers this case was not docketed nor was the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13(1). The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14(2) because of this error of appellant's lawyers. Rule 14(2) permits, but does not require, such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court have been injured—as the Court seems to intimate without record support—by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special category of administrative orders is frustrated.

"This case is now to take its place among a growing number of others where mere procedural rules have been used to prevent the consideration and determination of cases on their merits. See *e.g.*, *Lord* v. *Helmandollar*, 121 U. S. App. D. C. 168, 348 F. 2d 780, cert. denied, 383 U. S. 928, 86 S. Ct. 929, 15 L. Ed. 2d 847, Black, J., dissenting; *Reiss* v. *Murchison*, cert. *denied*, 383 U. S. 946, 86 S. Ct. 1196, 16 L. Ed. 2d 209, Black, J., dissenting; *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636, 82 S. Ct. 1386, 8 L. Ed. 2d 734, Black, J., joined by The Chief Justice, dissenting; *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 384 U. S. 1004, 86 S. Ct. 1908, 16 L. Ed. 2d 1018, Black, J., dissenting; *Santana* v. *United States*, 385 U. S. 848, 87 S. Ct. 74, Black, J., dissenting. I find it inconsistent with a fair system of justice to throw out a litigant's

case because his lawyer, due to negligence, or misunderstanding, or some other reason fails to satisfy one of many procedural time limits. If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?

"As I have previously stated, 'The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits.' *Beaufort Concrete Co., supra,* 384 U. S. at 1006, 86 S. Ct. at 1910, Black, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1)." *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32, 33.

For the above and foregoing reasons, petitioners submit that the Court has jurisdiction, and should exercise such jurisdiction to review the important question presented by the Petition.

Respectfully submitted,

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